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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. A-976

HARVEY B. YOUNG

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Eighth Circuit

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Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on April 9, 1980. The Court of Appeals denied Petitioner's Petition for Rehearing on May 1, 1980.

OPINION BELOW

The Opinion of the Court of Appeals is not yet reported, but is appended hereto as Appendix A. The order denying a rehearing is also appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1980; the Petition for Rehearing was denied on May 1, 1980. On May 13, 1980, this Court entered an order extending the time for filing this petition to and including June 30, 1980. (Appendix C). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the 1966 Amendment to Rule 18, F.R.Cr.P., permit trial by a jury drawn exclusively from a Division other than the Division in which the crime was allegedly committed where it is demonstrated that the populations of the respective Divisions contain diverse socio-economic patterns, and that persons of rural backgrounds are thereby systematically excluded from the prospective jury?

2. Does Rule 404(b) F.R.Ev. permit the use of massive amounts of evidence of crimes committed by persons other than the defendant, which crimes are not charged in the

indictment or alleged to be part of a conspiracy of which defendant is a member?

STATEMENT OF FACTS

Although this was a case of extremely intricate and complicated factual situations, petitioner, for the sake of brevity, will address only those factors most pertinent to the issues he has elected to raise herein.

A. *Unconstitutional Jury Composition*

Petitioner, the president of the Bank of Kirksville, was tried on a seven count indictment alleging in two counts, misapplication of bank funds and, in five counts, mail fraud in connection with two check kiting schemes. One check kite allegedly occurred between September 1, 1973 and October 25, 1973 and involved individuals named Eddie Norman and William Lyman. Another check kite allegedly occurred between March 19, 1974 and July 26, 1974 and involved Eddie Norman and Willie Scott. Petitioner was alleged to have knowingly facilitated the check kites by authorizing the payment of overdrafts, paying on uncollected funds and allowing Norman to exceed his lending limit at petitioner's bank.

The documentary evidence consisted primarily of a very large number of checks in significant amounts exchanged between Norman and Lyman and Norman and Scott. Many of the checks on their face purported to be for cattle transactions.

Petitioner's contention was that he was unaware of the check kites, but that he did allow Norman, a wealthy cattle dealer, certain leaway in his banking transactions, which petitioner contended was common in rural banking. He testified that Norman was a substantial customer of the bank who wrote a

very large volume of checks in connection with his cattle business, and further that Norman's liabilities to the bank, including overdrafts and payments on uncollected funds, were secured by a $400,000 deed of trust which was in evidence. He also testified regarding Norman's attempts to extort from him the release of loans secured by the deed of trust, and Norman's threats that he would implicate petitioner in his check kiting activity if petitioner did not release the loans. Norman acknowledged in his testimony that the extortion demands were made.

Several witnesses, including the former State Auditor of Missouri and the Chief Cashier of the Bank of Kirksville, testified as to the custom in rural communities of paying on uncollected funds and in affording customers the courtesy of notifying them of overdrafts and allowing them time to make deposits to cover them.

In view of this anticipated evidence, the location of the trial and population patterns of the area from which the jury was drawn became quite important.

Despite the fact that the situs of the alleged offense, and the residence of many of the witnesses was Kirksville, Missouri, located in the highly rural area of Northern Missouri, in the Northern Division of the Federal District, the indictment was filed and trial was scheduled in the Eastern Division, a highly urban area populated primarily by residents of St. Louis and St. Louis County. Petitioner's pre-trial motion to transfer the case to the Northern Division was denied as were his objections and motions to strike the venier drawn exclusively from the urban Eastern Division. In connection with his motion to strike and to transfer, petitioner presented statistics, of which the Court took judicial notice, indicating that the Northern

Division, the situs of the alleged crime, was 61.5% rural while the Eastern Division, from which the jury was drawn, was only 17.4% rural. The Court also took notice of its practice of drawing jurors only from the Division in which the case was tried. As a result, of the forty-one prospective jurors questioned, only nine resided in areas other than the St. Louis Metropolitan area and not a single prospective juror was engaged primarily in agricultural pursuits.

Petitioner contended that the rufusal of the Court to transfer the case to the Division which was the situs of the alleged offense or to strike the venier drawn exclusively from the Eastern Division, coupled with population disparities between the two Divisions, constituted a systematic exclusion of persons who resided in the vicinity of the alleged offenses and, more importantly, of persons of rural backgrounds.

The case, however, proceeded to trial before the jury drawn exclusively from the urban Eastern Division. The Court of Appeals rejected petitioner's argument based upon this issue noting the 1966 amendment to Rule 18 F.R.Cr.P. which permits trial in any location within the District in which the offense was committed, and concluding that Petitioner had no right to a jury drawn from the Division in which the crime was committed or from the entire District.

B. *Use of Evidence of Crimes of Other Persons*

As noted, the two check kites alleged in the indictment were the "Norman-Lyman" kite between September 1 and October 23, 1973 and the "Norman-Scott" kite between March 19 and July 26, 1974. The only persons Petitioner was alleged to have conspired with in connection with the check kites were Eddie Norman, William Lyman and William Scott. However, in addi-

tion to the evidence pertaining to the two check kites charged in the indictment, the Government introduced, over petitioner's pre-trial motion and objections at trial, over 40 exhibits and over 60 pages of testimony pertaining to check kites between William Lyman and a Dr. Barry Gushleff. This check kite occurred at the Bank of Kirksville and the Green City Bank between January and March 1974. It is not mentioned in the indictment and the Government's evidence indicated that Petitioner did not participate in it and was not even aware of it at least until it had ended in March 1974.

According to William Lyman, the Government's witness, Petitioner had discussed the exchange of checks with him after the kite had ended and had said ". . . it appeared we were kiting checks . . . he was angry." He quoted petitioner as saying, "If you guys are kiting checks your going to get your butts in a peck of trouble." (T. 582, 583, 612)

Nevertheless, the Court of Appeals rejected Petitioner's arguments based upon the admission of this evidence stating: "We agree that the evidence of similar activities *by persons other than appellant* was relevant to the issues before the court, not unduly time consuming and possessed probative value which sufficiently outweighed any prejudicial impact." (App. p. 18. Emphasis Supplied)

REASONS FOR GRANTING THE WRIT

I.

FURTHER DIRECTION IS NEEDED TO CLARIFY THE EXTENT TO WHICH THE 1966 AMENDMENT TO RULE 18, F.R.Cr.P. PERMITTING TRIAL IN A DIVISION OTHER THAN THE DIVISION IN WHICH THE CRIME WAS COMMITTED, ALSO PERMITS A JURY TO BE DRAWN EXCLUSIVELY FROM A DIVISION WHICH DIFFERS SUBSTANTIALLY IN SOCIO-ECONOMIC PATTERNS FROM THE DIVISION IN WHICH THE CRIME WAS COMMITTED.

Petitioner submits that this case represents a logical and necessary progression of the jury selection principles enunciated in the line of cases beginning with *Strauder v. West Virginia*, 100 U.S. 303 (1879) through *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Taylor v. Louisiana*, 419 U.S. 522 (1975) and *Duren v. Missouri*, 349 U.S. 357 (1979). Additionally, this case presents an opportunity to define the limits of Rule 18 F.R.Cr.P. as it has been applied to jury selection. As noted by the Court of Appeals, the Rule prior to 1966 had required trial in the Division in which the crime was committed, but was amended in that year to allow trial anywhere in the Federal Judicial District.

Although the Rule does not state, and this court has not yet addressed the issue of what geographical area the jury is to be drawn from, Rule 18 has obviously been interpreted by both the Trial and Appellate Courts herein to allow jury selection exclusively from a Division other than the situs of the crime even though the Divisions represent diverse socio-economic patterns.

If, in fact, the 1966 Amendment to Rule 18 F.R.Cr.P. permits the prosecution to select the area from where the jury is to be drawn by simply filing the indictment in the most favorable Division, even though the Division is not the situs of the crime, then a criminal defendant is indeed denied rights which were considered paramount by the framers of the Constitution.

Although there was a diverse practice among the colonies regarding the use of jurors drawn from the vicinity of the crime, when Parliament passed various venue acts which permitted trial in another province or England the colonists attacked these venue statutes as also depriving the accused of a trial by his peers from the "vicinage" of the crime. For example, the resolution of the Virginia House of Burgesses, dated May 16, 1769, after complaining about the colonists being tried in an inappropriate venue, also condemned the trials held in England because "the inestimable privilege of being tried by a Jury from the Vicinage, as well as the liberty of summoning and producing Witnesses in such Trials, will be taken away from the Party accused." Blume, *The Place of Trial of Criminal Cases Constitutional Vicinage & Venue,* 43 Mich. Rev. 59, 64 (1944).

The Provincial Congress of North Carolina noted, in resolution dated August 25, 1774: "Resolved that trial by juries of the vicinity, is the only lawful inquest that can pass upon the life of a British subject, and it is a right handed down to us from the earliest ages, confirmed and sanctified in the Magna Carta itself." *Constitutional Right to Trial by Jury of the Vicinage,* 57 U.Pa.L.Rev. 197, 198 (1909).

The common law "vicinage" requirement was broadened somewhat by the drafters of the Bill of Rights, but is preserved in the Sixth Amendment by the words, "State and district

wherein the crime shall have been committed . . ." The final draft of the Bill of Rights represents a compromise between strict common law, which called for juries from the neighborhood or county, and the original form of the Constitution which contained no provision regarding the area that jurors may come from. Since there were no "Divisions" of Districts at the time the Bill of Rights was drafted, to the framers, the State and District meant a somewhat broadened vicinage. Although the size of the "District" was left to later legislative determination, it was clear that jurors were to be drawn from some geographical area which *included* the place where the crime was committed. See: Kershen, *Vicinage*, 29 Okla. L. Rev. 801 (1976)

In fact, this Court has recognized the implicit vincinage requirement in the Sixth Amendment. In *United States v. Johnson*, 323 U.S. 273 (1944), the Court held that prosecution for using mails for sending dentures in violation of the Federal Denture Act – which contained no specific venue provision – cannot be had in the District to which the dentures were sent, but only in the District *from* which they were sent.

The Court noted (at p. 275) that the most viable constitutional policy was not to allow too great a leeway in the selection of a situs for trial because that "leads to appearance of abuses, if not abuses, in the selection of what may be deemed a tribunal favorable to the prosecution".

The Court further stated that:

> "the question of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern

> for trial in the vicinage to be respected rather than to be disrespected, construction should opinion the direction of constitutional policy, though not commanded by it." (*Id.* at 276.)

The Supreme Courts of several states have recognized the concept of vicinage inherent in the Sixth Amendment in holding that, while a jury may be drawn from a large area such as a State or Federal District, the procedures utilized could not systematically exclude residents of the area in which the crime was committed.

In *People v. Jones,* 510 P. 2d 705 (Cal. 1973), a criminal trial had been moved from a downtown courthouse to a suburban courthouse with an accompanying change in the jury venire. The California Supreme Court reversed the conviction holding that a criminal defendant is entitled to a jury drawn from a potential venire which includes persons residing in the geographic area where the crime occurred. The Court stated (at p. 711):

> Thus, while the outer limits of the 'district' as used in the Sixth Amendment are flexible, encompassing greater or smaller areas as the Legislature deems wise, the mandate of the Sixth Amendment remains immutable. *The district, however large or small, from which the jury is drawn must include the area wherein the crime was committed.*
>
> Although a jury drawn either from an entire county wherein the crime was committed or from that portion of a county wherein the crime was committed will satisfy the constitutional requirement of 'an impartial jury of the State and district wherein the crime shall have been committed' (U.S. Const., 6th Amend.) a jury drawn from only a portion of the county, exclusive of the place of the commission of the crime will not satisfy the requirement. (*Emphasis Supplied*)

Moreover, the Court held that, "[i]n our view, the rule quite simply is that a criminal defendant is entitled to a jury drawn from a jury panel which includes jurors residing in the geographic area where the alleged crime occurred." *Id.* at 711.

The Alaska Supreme Court reached the same conclusion in *Alvarado v. State,* 486 P. 2d 891 (Alaska 1971). Alvarado was charged with committing a crime in a native village, but was tried and convicted by a jury drawn from Anchorage. The Court used emphatic language in reversing the conviction.

> Because the focus of the concept of community is on the place where the offense has allegedly been committed, any narrowing of the area from which prospective jurors are drawn will have no effect on the impartiality of jury panels, so long as the narrow area of selection continues to include the scene of the crime . . . Where, on the other hand, prospective jurors are selected from an area which does not encompass the scene of the alleged crime, there will always be a danger that significant elements of the community in which the crime occurred will be excluded from representation on the jury panel and that the panel will consequently fail to represent a fair cross-section of the community. (*Id.* at 902-903).

See also *Maryland v. Brown,* 295 F. Supp. 63 (D.Md. 1969).

The reasoning of these cases conflict on the issue of vicinage being a Sixth Amendment concept with several decisions of the Federal Courts of Appeals. See e.g.: *Zicarelli v. Gray,* 543 F.2d 466 (3rd Cir. 1976) in which the concept is discussed at some length and a contrary conclusion is reached. While Petitioner submits that *Zicarelli* and cases similarly holding are distinguishable in other respects (see argument *infra*), to the extent that they totally discount the concept of vicinage in the Sixth Amendment, it is submitted that they reach an incorrect conclusion.

If the original concept of vicinage has any viability in the Constitution as presently interpreted, the holdings in *Jones, supra,* and *Alvarado, supra* would certainly seem to be correct application of the Sixth Amendment. Potential jurors from the area in which the crime occurred should not be excluded totally from the jury selection process, particularly where the respective Divisions represent diverse population patterns. The potential for prosecutorial abuse of such a situation is obvious in that the prosecutor generally has wide discretion as to where within a District to obtain and file the indictment.

In the instant case, the statistical data indicated that the Division which was the situs of the crime was 61.5% rural whereas the Division in which the indictment was filed and, consequently, from which the jury was drawn was only 17.4% rural. As indicated, petitioner's contentions regarding the latitude which he permitted in Eddie Norman's banking transactions were that they were consistent with the needs and practices of the rural, agricultural community. Accordingly, the experience of the jury may well have played a significant role in evaluating the evidence.

In this connection, the instant case differs significantly from those appellate court cases such as *Zicarelli v. Gray,* 543 F.2d 466 (3dr Cir. 1976) and *United States v. Florence,* 456 F. 2d 46 (4th Cir. 1972) in which the court found no significant difference demonstrated between the Division in which the crime was committed and the Division from which the jury was selected. Consequently, this case presents not only the issue of whether exclusion of jurors from the "vicinage" is permitted under the Sixth Amendment, but whether by reason of the application of Rule 18, exclusion of rural representation, as a cognizable group, is permitted under the Sixth Amendment.

In *Thiel v. Southern Pacific, supra,* this Court held that day laborers had been improperly excluded from the jury lists and again recognized the principles first enunciated in *Strauder v. West Virginia, supra,* that potential jurors must be drawn without systematic exclusion of any economic, social, religious, racial, political or geographic group. In *Taylor v. Louisiana, supra,* the Court rejected a state procedure which permitted exclusion of women on petit juries and in *Duran v. Missouri, supra,* the Court found that the underrepresentation of women on juries due to the automatic exemptions allowed women in Missouri was in violation of the Sixth Amendment. Although women in Missouri were not totally excluded from juries, the statistical evidence presented indicated that, in a population which was 54% women, juries were only 15% women and, consequently, did not represent a fair cross-section of the community. In the instant case, jurors were chosen from a group which was only 17.4% rural instead of the 61.5% rural Division in which the crime was allegedly committed. The 41 person panel from which the jury was drawn contained only 9 persons who did not reside in the St. Louis Metropolitan area and not a single member of the panel was engaged primarily in agricultural pursuits. Consequently, the disparity between population and jury composition is even more pronounced in the instant case than in *Duran, supra.*

Although *Strauder, supra,* concerned the exclusion of blacks, *Thiel, supra,* the exclusion of laborers, and *Taylor* and *Duran, supra,* the exclusion of women, it is submitted that rural residents are no less a cognizable group than those heretofore addressed by the Court. For example, in *United States v. DiTommaso,* 405 F. 2d 385 (4th Cir. 1968), the Court, although rejecting Appellant's geographic exclusion argument noted (at p. 392) "geography, as a proper criterion for measur-

ing jury selection, has more significance when it reflects urban versus rural representation."

The instant case therefore represents a unique opportunity for the Court to expand the *Thiel-Duran* line of cases and to clarify whether the effective exclusion of identifiable segments of the population from juries through the use of the 1966 amendment to Rule 18, F.R.Cr.P. is consistent with both the intent of the Rule and the demands of the Sixth Amendment. The Petition should, therefore, be granted to address this important issue.

II.

FURTHER DIRECTION IS NEEDED TO DEFINE THE SCOPE OF FED. R. EVID. 404(b) REGARDING THE USE OF "OTHER CRIMES EVIDENCE" AND TO RESOLVE A DECISIVE SPLIT AMONG THE UNITED STATES COURTS OF APPEALS REGARDING THE ADMISSIBILITY OF CRIMES OF PERSONS OTHER THAN THE DEFENDANT ON TRIAL.

Based on the theory that evidence of check kiting activities, outside the scope of the indictment would prove acts of similar conduct admissible under Fed. R. Evid. 404(b), the Court allowed the government to introduce an overwhelming amount of evidence and testimony pertaining to a check kite which the government's own witness indicated did not involve the petitioner. Over 40 exhibits and over 60 pages of testimony pertained solely to this check kite, referred to by the Court of Appeals as the "Kirksville-Green City Kite". (App. 6)

The Court of Appeals found, however, that "the evidence of similar activities *by persons other than appellant* was rele-

vant to the issues before the Court, not unduly time consuming and possessed probative value which sufficiently outweighed any prejudicial impact."

Petitioner submits that the sanctioning of this procedure by the Appellate Court expands the scope of Fed. R. Evid 404(b) in the Eighth Circuit, thereby creating a severe and apparently irreconcilable conflict with regard to the proper criteria for the admissibility of "other crime evidence" among the United States Appellate Courts. Petitioner believes this is the first case approving the use of "evidence of similar activities by persons other than the (defendant on trial)".

Federal Rules of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rule has been the subject of much Appellate Court discussion since its enactment and the following general rules have emerged:

(1) The evidence must be relevant. The courts will not presume relevance, *United States v. Manafzadeh*, 592 F. 2d 81, 86 (2d Cir. 1979); *United States v. O'Connor*, 580 F. 2d 38, 40 (2d Cir. 1978).

(2) The evidence must be "clear and convincing", *United States v. Jardan*, 532 F. 2d 216 (8th Cir. 1977); *United States v. Bledsoe*, 531 F. 2d 888 (8th Cir. 1976) citing *United States v. Clemons*, 503 F. 2d 486, 469 (8th Cir. 1974) (a pre-Rule 404 case).

(3) The quantum of the evidence must not exceed the necessity to prove one of the elements of the offense charged. Where the quantity of other crimes evidence has exceeded this necessity, it has been held improper despite the fact that it might have been relevant. *United States v. Ostrowsky*, 501 F. 2d 318, 321-328 (7th Cir. 1974); *United States v. Cavallino*, 498 F. 2d 1200 (5th Cir. 1974); *United States v. Abbadessa*, 470 F. 2d 1333 (10th Cir. 1972).

(4) The probative value of the other crime evidence must not be substantially outweighed by its prejudicial effect. *United States v. Manafzadeh*, 592 F.2d 81, 86 (2d Cir. 1979); *United States v. Herman*, 589 F. 2d 1191, 1198-1199 (3d Cir. 1978); *United States v. Back*, 588 F. 2d 1283, 1285 (9th Cir. 1979); *United States v. Weir*, 575 F. 2d 668, 670 (8th Cir. 1978); *United States v. Clemons, supra*, 503 F. 2d at 489-491; *United States v. Weidman*, 572 F. 2d 1199, 1202-1203 (7th Cir. 1978); *United States v. Ring*, 513 F. 2d 1001, 1004 (6th Cir. 1975).

(5) There must be substantial probative need for the other crime evidence. *United States v. Silva*, 580 F. 2d 144, 148 (5th Cir. 1978); *United States v. Ring, supra.*

In all of these cases, however, it had appeared axiomatic that the evidence must pertain to crimes committed *by the defendant on trial*, and not to crimes of other persons.

For example, in *United States v. Beechum*, 582 F. 2d 898 (5th Cir. 1978), the Court of Appeals for the Fifth Circuit, while ruling that the "other crimes evidence" was admissible to prove defendant's intent to possess stolen mail material formulated the criteria for admissibility as follows: (at p. 912, 913)

Obviously, the line of reasoning that deems an extrinsic offense relevant to the issue of intent is valid only if an offense was in fact committed and the defendant in fact committed it. Therefore, as a predicate to a determination that the extrinsic offense is relevant, the Government must offer proof demonstrating that the defendant committed the offense. If the proof is insufficient, the judge must exclude the evidence because it is irrelevant. The issue we must decide is by what standard the trial court is to determine whether the Government has come forward with sufficient proof.

The standard of proof for ruling upon factual conditions to relevancy is supplied by Fed.R.Evid. 104(b), which states as follows:

> Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

As the rule provides, the task for the trial judge is to determine whether there is sufficient evidence for the jury to find that the defendant in fact committed the extrinsic offense. See Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L.Rev. 165 (1927). (*Emphasis Supplied*)

In *United States v. Mann*, 590 F. 2d 361 (1st Cir. 1978), the Court of Appeals for the First Circuit had occasion to directly address the issue of evidence of crimes by other persons. The Court reversed a conviction for importation of cocaine because the Trial Court had admitted evidence that on a prior occasion defendant had been in the presence of a traveling companion who was arrested and found to have cocaine in his suitcase.

The Court of Appeals acknowledged the similarity between the previous confrontation and allegations at trial, but nevertheless reversed the conviction stating that the evidence of the previous event was not shown to be sufficiently relevant. in so ruling the Court cited the Fifth Circuit decision in *United States Vosper,* 493 F. 2d 433 (5th Cir. 1974).

In *Vosper, supra,* a prosecution for bank robbery, the prosecution elicited evidence that the defendant had been seen a block and a half from the scene of a previous robbery by the same alleged accomplice as the case there at bar. Despite the similarity of events, the Court of Appeals reversed saying: (at p. 437)

> The fact that it was a robbery of a savings and loan office by the same robber (Lynn) and with no other action by Vosper – save being in the general vicinity – created the hazard of prejudice not only that Vosper was a law breaker, but that he ran with other such law breakers. This error cannot be considered as harmless error so a new trial is called for.

Similarly, in the instant case, there was evidence that both Gushleff and Lyman, the participants in the check kite not charged, were acquaintances of the petitioner, but no evidence that petitioner was involved in that check kite. The inference was clear, therefore, that petitioner "ran with other such law breakers". The opinion of the Eighth Circuit Court of Appeals, in the instant case is, therefore, in direct conflict with opinions of the Courts of Appeals for the First and Fifth Circuits and appears to be the first case extending Rule 404(b) include "crimes by other persons".

Moreover, the quantum of the "other crimes" evidence allowed in the instant case in itself, creates a conflict among the

Circuits. Even where the evidence has indicated the defendant's possible involvement in the "other crimes" the Second and Seventh Circuits have been most restrictive in allowing a large volume of such evidence to be introduced, as it was in the instant case.

For example, in *United States v. O'Conner, supra,* appellant was charged with two counts of taking money from meat packing companies in connection with his official duties as a government inspector. During its case in chief, the government apparently consumed more than half of its time introducing evidence to the effect that appellant took money from meat packing companies other than those included in the indictment, as a means to prove appellant's intent, knowledge, lack of mistake and common design or plan. On appeal, the Second Circuit found that the "other crime" evidence was perhaps probative of appellant's habit or character, but not of the existence of a specific plan of which the charged acts were just a part. When the government then attempted, on appeal, to have the Court retroactively justify the admission of the evidence as being relevant to show a unique pattern or plan, the Second Circuit Court demurred.

> "We therefore hold that the other crimes testimony should have been excluded. It was not relevant to a significant issue that was truly in dispute and was therefore inadmissible under Rule 404(b). Not only was the evidence irrelevant, it was prejudicial because it might lead a jury to convict because it thought the defendant's character was such that he frequently committed crimes. *Moreover, the evidence distorted the emphasis at trial away from the crimes covered by the indictment to those not so charged. On these facts, the evidence should have been excluded."* (*Id.* at 43, *Emphasis Supplied*)

See also, *United States v. Ostrowsky,* 501 F. 2d 318 (7th Cir. 1974) finding error where the quantum of the "other crimes" evidence was found to be excessive.

In view of the conflict which the opinion below creates regarding the use of evidence of crimes by "other persons" and the need for this Court to clearly delineate the parameters of Rule 404(b) F.R.Evid., the Petition for Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons it is submitted that the Court should issue its Writ of Certiorari to review the decision and opinion of the Court of Appeals herein.

Respectfully submitted,

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APPENDIX

(Appendix A)

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 79-1573

UNITED STATES OF AMERICA,

Appellee,

v.

HARVEY B. YOUNG, JR.

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: January 14, 1980
Filed: April 9, 1980

Before STEPHENSON and McMILLIAN, Circuit Judges, and THOMAS*, Senior District Judge.

THOMAS, District Judge.

*The Honorable Daniel H. Thomas, Senior United States District Judge, Southern District of Alabama, sitting by designation.

Defendant appeals from a seven count indictment charging two counts of misapplication of bank funds in violation of Title 18, United States Code, Sections 2 and 656 and five counts of mail fraud in violation of Title 18, United States Code, Sections 2 and 1341. A trial by jury was commenced on May 25, 1979, before the Honorable John F. Nangle, District Judge, United States District Court, Eastern District of

Missouri. Defendant was found guilty on all counts. We affirm the judgment of the District Court.

This case concerns alleged check-kiting activity between Harvey B. Young, Eddie C. Norman, William E. Lyman and Willie Scott during an eleven month period beginning in September 1973 and continuing through July 1974.

Norman plead guilty to mail fraud charges arising out of this kiting activity in December 1976. Lyman entered a plea of guilty thereafter. Scott was convicted by a jury of mail fraud centering on his check-kite in January 1977. Appellant, Young, was indicted in August 1978.

Because of the numerous interactions between those involved, a comprehensive review of what is a complex fact situation is necessary.

Appellant Young is a lifelong resident of Kirksville, Missouri, and President of the Bank of Kirksville, one of the lending institutions with which we are concerned.

Eddie C. Norman was the operator of the Schuyler County Sale Company, a successful cattle sale barn at which livestock was auctioned. Norman had known appellant for a period of some ten years and maintained both personal and business accounts with appellant's bank.

William E. Lyman was a commodities broker, who along with Norman and one Junior Liston, formed the Schuyler County Commodity Brokerage. The purpose of such brokerage was to act as a conduit through which appellant and others in Kirksville might play the commodities market.

Using Lyman as his broker, Norman became actively involved in the trading of futures contracts. Their initial success

spawned interest by Barry Gushleff, a Kirksville osteopath and close friend of appellants, as well as appellant himself. Convinced by Norman, Gushleff and appellant that a brokerage business in northeast Missouri would be lucrative, Lyman moved from Marshalltown to Lancaster, Missouri, in the spring of 1973.

Shortly thereafter, Young, Gushleff and several professional men in Kirksville formed the Adair County Trading Club (ACTC) to pool their resources as they played the commodities market. Simultaneously, Norman, Lyman and one Junior Liston formed the Schuyler County Commodity Brokerage (SCCB). A contract was executed whereby SCCB was to handle the investments of ACTC in return for fifty percent of ACTC's profits or losses.

In the summer of 1973 Norman began experiencing serious cash flow problems. Norman approached appellant for a loan but was informed that loans were not available for such investments.

Subsequently, Young met with Norman and Lyman at the bank of Kirksville. During this meeting Young told Lyman that, "We've got to help Eddie everyway we can."[1] It was then agreed that Norman and Lyman could generate a cash flow by kiting checks between Norman's accounts at the Bank of Kirksville and Lyman's accounts at the Schuyler County Bank

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[1]T.T. 510

in Lancaster, Missouri, and the Fidelity Savings Bank in Marshalltown, Iowa.[2]

Prior to the Norman-Lyman-Young meeting, Norman had kited checks with several other associates.[3] One such associate was Junior Liston.

During the ensuing months, Young, Norman and Lyman maintained almost daily contact.[4]

KIRKSVILLE-SCHUYLER COUNTY KITE

Within a short period after their September metting, Norman and Lyman began kiting checks. Norman drew checks against his account at the Bank of Kirksville while Lyman did likewise at the Schuyler County Bank in Lancaster, Missouri. On the first day of this kite in September of 1973, the opening balance of Lyman's account at the Schuyler County Bank was $224.25 and Norman's livestock account was overdrawn in the amount of $92,875.13[5] This overdraft was immediately brought to Young's attention by FDIC personnel then examining his bank.

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[2]Check kiting is a plan wherein one or more parties, utilizing checking accounts at two or more banks systematically exchange checks of similar amounts. Utilizing the delay or lag time as the checks are cleared through the Federal Reserve System, an inflated and uncollected balance is created and maintained at the banks. While checks drawn against uncollected funds are in the clearing process, the parties have the use of the deposited but uncollected funds, which make up the "float".

[3]T.T. 178; 244-247

[4]T.T. 153; 497

[5]T.T. 472-479; Gov't. Exh. 1-1; 2-1

However, on September 11, 1973, three Lyman checks, totalling approximately $95,000.00 were deposited in the Eddie Norman livestock account. The following day, September 12, 1973, two Norman checks totalling approximately $77,000.00 were deposited in Lyman's account at the Schuyler County Bank.[6] This exchange lasted but a short time before being discovered by Leo Funk, President of the Schuyler County Bank. Funk terminated the kite and personally took the Norman checks to the Bank of Kirksville for payment. Funk met with cashier Ben Graves at Kirksville whose review of Norman's account showed insufficient funds to honor the checks held by Funk. Grave informed Young of the situation and was thereafter directed by Young to issue a cashier's check to Funk in the amount of $125,219.50.[7]

Young was charged in Count I of the indictment with misapplying $68,843.77. Such an amount represents the difference between what Norman had in his account and the amount of the kited Norman checks presented by Funk and honored by Young.

KIRKSVILLE-MARSHALLTOWN KITE

The Kirksville-Marshalltown kite began at approximately the same time as the exchange at the Schuyler County Bank, but continued through November 1973. The parties involved were once again Norman and Lyman.

In order to clear Lyman's checks deposited in Norman's account, the Bank of Kirksville would mail the checks to the

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[6]T.T. 470-483; Gov't. Exh. 1-1 thru 1-12; 2-1 thru 2-13.

[7]T.T. 115-116; 750-753; 944-945; Gov't Exh. 1-7.

Continental Illinois National Bank and Trust, its Federal Reserve correspondent bank in Chicago. On October 2, 1973, the Bank of Kirksville processed Lyman's checks in such manner by placing them in the United States mail.[8] Such actions constituted violations of mail fraud as charged in Count III of the original indictment.

As this kite approached its conclusion, Norman withdrew approximately $250,000.00 of his equity from the commodity market and also obtained, with Young's assistance, a loan of $200,000.00 from the National Stockyards Bank. These funds and allowed the kite to end without a financial loss to either were deposited in Norman's account at the Bank of Kirksville bank.

KIRKSVILLE-GREEN CITY KITE

Lyman and Gushleff began a check-kite in January 1974.[9] Lyman used his account at the Bank of Kirksville while Gushleff employed a corporate account at the Farmers Bank of Green City, Missouri. This kite progressed through February and March of 1974.

Toward the end of this kite, Lyman and Gushleff began disputing who owed the other money. William Reed witnessed one such argument in Gushleff's office and thereafter informed Young of such a kite.[10]

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[8]T.T. 219; 767-769; Gov't Exh. 1-79; 3-25; 3-26.

[9]T.T. 555

[10]T.T. 1120

A short time lated Young met with Lyman and Gushleff at the Bank of Kirksville to settle their differences.

Lyman was informed that he owed Gushleff approximately $18,000.00 as a result of the kite. When Lyman stated that he could not produce the needed funds, he was told by Young to sign a note for the difference.[11]

Alerted to Gushleff's account by its overdraft activity, the president of the Green City Bank, William Carr, suspected a kite and began returning Gushleff's checks, thereby terminating the exchange.

KIRKSVILLE-WAPELLO-WEAVER FORT MADISON KITES

In March 1974, Norman remained in debt to the Bank of Kirksville. At this time Young and Norman agreed to resume a check-kite. Norman selected Willie Scott, an Iowa livestock dealer, as the second party to the kite. Such kite progressed between Norman's accounts at the Kirksville Bank and Scott's accounts at the State Bank of Wapello, in Wapello, Iowa, and the Farmers Savings Bank in Weaver, Iowa.[12]

The Kirksville and Wapello kite lasted briefly before A. T. Wollensaupt, an official at the Wapello bank, compared Scott's checks against his deposits and discovered the irregularities.

The final kites between Norman's accounts at appellant's bank and Scott's accounts at Weaver and the Lee County

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[11]T.T. 613-161

[12]T.T. 266, 273; 876

Savings Bank in Fort Madison, Iowa, lasted from March through July of 1974.

Kirksville cashier Graves determined that Norman and Scott were kiting checks, and in June of 1974, reported this to Young.[13]

Young informed Norman that Graves was angry about the kite and that Norman should cover-up the exchange in some way.[14]

The mailings of Scott checks by the Bank of Kirksville to the Continental Illinois National Bank on June 24, July 6, July 10, and July 15, 1974, comprise the mail fraud charges in Counts IV through VII of the indictment.

Young's honoring the kited checks on July 12, 1974, originated the misapplication charge in County VIII of the indictment.

COVER-UP

Within a short time subsequent to the termination of the kites, Young and Norman met at the Bank of Kirksville. Young assured Norman that Young could straighten out any difficulties that may have arisen and that Norman should in no manner mention Young's involvement therein.[15]

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[13]T.T. 815-819; 841-842

[14]T.T. 298-299

[15]T.T. 315-316

During the early stages of the investigation Young repeatedly assured Norman that Young would afford his family sufficient care and maintenance should Norman go to jail. Young continued to insist that his name not be mentioned as a participant.[16]

After Norman's indictment, Young refused to speak to Norman. Thereafter, Norman attempted to reach Young via Young's associate, Gushleff. Norman then threatened to expose Young's involvement unless Young agreed to release Norman's debts at the Kirksville Bank. Norman also imposed demands upon Gushleff, as a condition to Norman's silence concerning Gushleff's prior kiting activities.

Gushleff later appeared before a federal grand jury, and when questioned about the facts of this case, asserted his Fifth Amendment privilege against self-incrimination.

I. Appellant's Motion to Dismiss the Misapplication Counts of the Indictment.

Appellant contests the trial court's failure to dismiss Counts I and VIII of the indictment on the grounds that they failed to state offenses. He contends that since the misapplication counts of the indictment do not use the words "with an intent to injure or defraud", that the indictment is fatally defective. Additionally, he submits that the evidence was insufficient to support these two charges. We are unable to find favor with such assertions.

An indictment which tracks the language of the appropriate statute, advises the defendant of the elements of the offense,

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[16]T.T. 316; 325-326; 441

appraises him of the charges, and allows him to plead a conviction or an acquittal as an impediment to subsequent prosecutions and is sufficient. *United States v. Fleming*, 526 F.2d 191, 192 (8th Cir. 1975), *cert. dismissed*, 423 U.S. 1082 (1976).

This Court has stated:

> An indictment 'will ordinarily be held sufficient unless it is 'so defective that by no reasonable construction can it be said to charge the offense for which the defendant [was] convicted.' *Muench v. United States*, 96 F.2d 332, 335 (1938).

See also, United States v. Ivers, 512 F.2d 121, 123 (1975).

Counts I and VIII of the present indictment assert a violation of Title 18, U.S.C. Section 656. That section provides in part:

> Whosoever, being an officer*** or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank *** willfully misapplies any of the moneys, funds or credits of such bank *** shall be fined not more than $5,000 or imprisoned not more than five years, or both ***

Counts I and VIII of the original indictment, in pertinent parts, read:

> *** HARVEY B. YOUNG, JR.
>
> the defendant herein, as President of the Bank of Kirksville, Missouri, the deposits of which were then insured by the Federal Deposit Insurance Corporation, did willfully misapply and caused to be misapplied [amounts] of the money and funds of said bank ***

The government suggests and we agree that the present indictment sufficiently traces the language of the applicable statutes.

As to appellant's position that there exists no sufficient evidence to support Counts I and VIII, our posture is adverse. We discern an obvious violation of the misapplication statute in light of appellant's orchestration of the numerous kites herein. *United States v. Giordano,* 489 F.2d 327 (2nd Cir. 1973); *United States v. Stevison,* 471 F.2d 143 (7th Cir. 1972); *Rakes v. United States,* 169 F.2d 739 (4th Cir. 1949), cf., *United States v. Caldwell,* 544 F.2d 691 (4th Cir. 1976).

II. The Government's Response to Appellant's Pre-Trial Request for Favorable Evidence.

Prior to the trial appellant moved for production of favorable evidence under *Brady v. Maryland,* 373 U.S. 83 (1963) and request, *inter alias*

> • • • any information whatsoever which may tend to impeach or effect the credibility of witnesses whom the Government intends to call at trial.

The Government responded that:

> • • • The Government is aware of its duties under *Brady v. Maryland,* 373 U.S. 83 (1963) and has tendered such material to the defendant. If any further 'Brady' materials come into the possession of the Government they will immediateley be tendered to the defendant without further court order.

Appellant contends that the failure of the government to provide F.B.I. reports of interviews with Dr. Barry Gushleff resulted in a violation of due process and accordingly, requires a new trial. We disagree.

Subsequent to the trial of this case, a hearing was conducted in the District Court concerning possible violations of *Brady v. Maryland, supra.* The Court held that no such violation had occurred, citing *Mullins v. United States,* 487 F.2d 581 (8th Cir. 1973). Appellant's motion for a new trial was then denied.

All parties agree that *Brady v. Maryland, supra,* requires the government to produce evidence favorable to the defendant. It is clear that the information must be both material and likely to effect the outcome of the trial. *United States v. Agurs,* 427 U.S. 97, 104 (1976). *See also, Evans v. Janning,* 489 F.2d 470, 475 (8th Cir. 1973).

While the government agrees with the proposition that the Gushleff interviews were not *per se* afforded to appellant, it rebukes any assertion of a *Brady* violation on three grounds. First: all of the information contained in the Gushleff interviews was provided to appellant in other reports in advance of trial;[17] Second: the reports and exhibits made available to appellant prior to the trial alerted him to Gushleff's knowledge of the check-kites and subsequent cover-up and extortion attempts; Third: even without the reports and exhibits provided by the government, the appellant had personal knowledge of Gushleff's role in these affairs.

The government is under no obligation to disclose to a defendant what he already knows. *United States v. Corey,* 566 F.2d 429, 431 n. 5 (2nd Cir. 1977); *United States v. Robinson,* 560 F.2d 507, 518 (2nd Cir. 1977); cf. *DeBerry v. Wolff,* 513 F.2d 1336, 1340 (8th Cir. 1975).

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[17]Appendix A of government's brief.

Inasmuch as the information deemed suppressed by appellant was in fact supplied to him under the heading of a Norman, Lyman or Young report, as opposed to a Gushleff interview, it is nothing more than an argument of form over substance and is consequently unavailing.

III. Appellant's Motion to Transfer the Trial from the Eastern Division to the Northern Division of the Eastern District of Missouri and to Strike the Jury Panel.

Appellant would have us believe that he was denied his right to a fair trial when the trial court refused his request that the case be transferred to the Northern Division of the Eastern District of Missouri. As the government points out, such a claim revolves around a three-pronged basis: (1) A defendant has a right to be tried in the division in which the offense occurred; (2) A defendant has a right to have a venire panel selected from the entire district; and (3) The jury which heard this case allegedly did not represent a fair cross section of the community in which the offenses were committed.

Despite the above argument, the appellant struck from a list of prospective jurors, among others: (1) Grace Ashby, who at the time of trial lived in a small rural town, was raised on a farm, and previously did business with a small bank;[18] and, (2) Frank Breeden, who had been associated for many years with a small rural bank.[19]

Whatever the reasons for appellant's actions in striking such prospective jurors, it apparently flies in the face of any claim

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[18]Supp. T.T. 9: 11

[19]Supp. T.T. 8

concerning lack of representation on the jury by a fair cross section of the community.

Regarding appellant's contention of his right to be tried in the Northern Division of the Eastern District of Missouri, we are unable to support such an assertion.

An amendment in 1966 to Rule 18, Federal Rules of Criminal Procedure, deleted the previous requirement that a defendant be tried in the division in which the offense occurred. The rule in its present form states in part:

> • • • prosecution shall be had in a district in which the offense was committed.

This has been interpreted to mean that as long as the trial takes place within the district in which the offense took place, no errors occurs. *United States v. Mase,* 556 F.2d 671, 675 (2nd Cir. 1977); *United States v. Cates,* 485 F.2d 26 (1st Cir. 1974). In *United States v. Brown,* 535 F.2d 424 (8th Cir. 1976), this Court held that there is no constitutional right to a trial within a certain division.

Appellant cites the term "vicinage" to support his argument that the jury should have been selected from the entire district. Such position is however, directly contra to *Zicarelli v. Gray,* 543 F.2d 466 (3rd Cir. 1976). The Court there found no constituitional right to have jurors drawn from an entire district.

With regard to appellant's claim that the jury panel was unconstitutional because it did not consist of the same ratio of rural to urban jurors as that which exists in the Northern Division, we are unable to find support for such a position.

Exclusion from the jury of persons from particular geographical areas does not violate the Sixth Amendment. *United*

States v. Florence, 456 F.2d 46 (4th Cir. 1972). In that case it was noted that the Northern District of West Virginia had six separate locations for holding court, including the cities of Parkersburg and Elkins. Although the crime charged in the case occurred in Parkersburg, the indictment was returned and the trial conducted in Elkins. Members of the panel were chosen only from the counties surrounding Elkins and there were no prospective jurors from either the area where the crime was committed or where the defendant resided. The Fourth Circuit held that since the jury came from both the state and district in which the crime had been committed, no rights of the defendant had been breached.

IV. Appellant's Motion for a Mistrial Concerning a Comment in the Government's Closing Argument.

Appellant seeks reversal of his conviction based upon a comment by the government during its closing argument concerning its refusal to call Gushleff as a witness in the case.

In response to appellant's arguments, the following two sentences were uttered by the Assistant United States Attorney and serve as the basis of appellant's motion for a mistrial:

> We talk about the Fifth Amendment. I think you can anticipate where Dr. Gushleff is.

In discussing the motion, the court noted that appellant was "given extensive leeway" in his argument without objection from the government,[20] and concluded:

> I do think, Mr. London, that you came down pretty hard in the area of failure to call witnesses, some of it, most of

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[20]T.T. 1197

> it, within propriety, some of it, I think, you stepped a little wide, but there was no objection, so that's the way it goes. I do not feel that Mr. O'Malley was guilty, of any prosecutorial impropriety. I don't believe the problem even comes close to rising to that level.[21]

Appellant's motion for a mistrial was denied, government's counsel was cautioned not to reenter this area, and a cautionary instruction promptly given to the jury.[22]

As regards closing arguments of government counsel, this court has held that:

> The dominating question, always, is whether the argument complained of was so offensive as to deprive the defendant of a fair trial.

Isaacs v. United States, 301 F.2d 706, 736, *cert. denied,* 371 U.S. 818 (1962)

Broad discretion in the area of closing arguments is vested in the trial court. *United States v. Robinson,* 539 F.2d 1181 (8th Cir. 1976, *cert. denied,* 429 U.S. 1101 (1977).

Absent a clear abuse of that discretion, the ruling of the trial court is not to be disturbed. *United States v. Bohr,* 581 F.2d 1294 (1978), *cert. denied,* 439 U.S. 958.

We are unable to perceive any prejudicial impact moving towards the appellant from the government's closing comments. For this reason, denial of appellant's motion for a mistrial was proper.

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[21]T.T. 1201

[22]T.T. 1202-1203

V. Evidence of Similar Acts Committed by the Appellant.

Appellant argues that "massive amounts" of evidence of crimes not charged in the indictment were received at his trial and that he was prejudiced thereby. The evidence in dispute concerned a check-kite between the appellant's friend Gushleff, using the Farmers Bank of Green City, and Norman and Lyman, who both used the Bank of Kirksville. Such kite occurred after the Kirksville-Marshalltown kite, but before the Kirksville-Wapello-Weaver-Fort Madison kites.

Evidence of similar acts is admissible where there is a genuine issue as to intent, pre-conceived plan, or absence of mistake or accident. *United States v. Clemons*, 503 F.2d 486 (1974). Such evidence may be admitted if (1) an issue is raised on which evidence of other crimes may be received; (2) the proferred evidence is relevant to that issue; (3) the evidence is clear and convincing; and (4) the probative worth outweighs any prejudicial impact. *Clemons, supra* at 489; *United States v. Conley*, 523 F.2d 650, 653-654, *cert. denied*, 424 U.S. 920 (1976); *United States v. Cochran*, 475 F.2d 1080, 1082, *cert. denied*, 414 U.S. 822 (1973).

It is only when the questioned evidence clearly has no bearing upon any of the issues involved, that the discretion of the trial court will be disturbed and the case reversed. *Conley, supra* at 654; *Cochran, supra* at 1082.

This court has held that where specific intent and guilty knowledge are elements of the crime charged, "evidence of related criminal activity tending to establish those elements is generally admissable." *United States v. Gocke*, 507 F.2d 820, 824 (1974).

Additionally, in accordance with *United States v. King*, 572 F.2d 1274, 1275 (8th Cir. 1978), the court clearly instructed the jury that appellant was not on trial for any conduct not alleged in the indictment.

We agree that the evidence of similar activities by persons other than appellant was relevant to the issues before the court, not unduly time consuming and possessed probative value which sufficiently outweighed any prejudicial impact. For such reasons, it was properly admitted.

VI. The Trial Court's "On or About" Instruction as to the Exact Date of the Offenses Charged.

Appellant asserts trial court impropriety in its instruction to the jury that "*** the proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged."[23]

Appellant in his brief recognizes that the "on or about" instruction is generally approved. *See* e.g., *United States v. Henderson,* 434 F.2d 84, 86 (6th Cir. 1970); *United States v. Brody,* 486 F.2d 291 (8th Cir. 1973).

We are unable to accept appellant's claim that designation of a specific date is essential to proof of the offense aginst him.

VII. Insufficient Evidence to Warrant an Acquittal

Finally, as somewhat of a catchall, appellant alleges that the evidence presented at trial was insufficient to sustain his con-

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[23]T.T. 1214

victions and, as a result, his motions for judgments of acquittal were improperly denied.

The function of an appellate court is not to resolve conflicts in testimony, or judge the credibility of witnesses, this is for the jury. As a corollary thereto, it is well established that by reason of the jury's findings of guilty, the government is entitled on appeal to the benefit of all reasonable inferences from the evidence and that any conflicts in the testimony are to be resolved in favor of the jury verdict. *United States v. Knife,* 592 F.2d 472 (8th Cir. 1979); *United States v. Smith,* 564 F.2d 244 (8th Cir.), *cert. denited,* 434 U.S. 1079 (1978).

We feel that the jury verdict is adequately sustained by the sufficiency of the evidence. Accordingly, appellant's motions were properly refused.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

(Appendix B)

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

September Term, 1979

No. 79-1573

UNITED STATES OF AMERICA,

Appellee,

vs.

HARVEY B. YOUNG, JR.,

Appellant

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 1, 1980

(Appendix C)

SUPREME COURT OF THE UNITED STATES

No. A-976

HARVEY B. YOUNG, JR.

Petitioner

v.

UNITED STATES

Respondent

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 30, 1980.

/s/ Harry A. Blackmun

Associate Justice of the Supreme Court of the United States

Dated this 13th day of May, 1980.

Supreme Court, U. S.
FILED
AUG 27 1980
MICHAEL RODAK, JR., CLERK

No. 79-2076

In the Supreme Court of the United States

OCTOBER TERM, 1979

HARVEY B. YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2076

HARVEY B. YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether a criminal defendant's trial by a jury drawn from the judicial district in which his offense was committed, but from a division of the district other than the division in which the offense was committed, violates the Sixth Amendment.

2. Whether the district court abused its discretion in admitting evidence of conduct not charged in the indictment, but relevant to the issue of unlawful intent or knowledge.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1980. The court of appeals denied the defendant's petition for rehearing on May 1, 1980 (Pet. App. B). On May 13, 1980, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari until June 30, 1980; the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of misapplication of bank funds, in violation of 18 U.S.C. 2 and 656, and five counts of mail fraud, in violation of 18 U.S.C. 2 and 1341. The district court sentenced petitioner to concurrent terms of two years' imprisonment on each count and fines totalling $10,000. The court of appeals affirmed.

At trial the government introduced evidence to show that shortly after moving to Lancaster, Missouri in the spring of 1973, William Lyman, a commodities broker, established a commodities brokerage firm with Eddie Norman, a local businessman, and Junior Liston (Pet. App. A-3). Petitioner, who was president of the Bank of Kirksville, Missouri, together with Norman and Barry Gushleff, a close friend of petitioner, had convinced Lyman that a commodities brokerage business in northeastern Missouri would prove profitable (Pet. App. A-2 to A-3). About the same time as Lyman and his associates established the brokerage firm, petitioner Gushleff, and several other local professional men set up

an investment club to pool their resources for investment in the commodities markets (*id.* at A-3). Pursuant to contract, the brokerage firm was to handle the investments of the club in return for a percentage of the club's profits (*ibid.*).

In the summer of 1973, petitioner met with Norman and Lyman, two of the founders of the brokerage firm, to discuss methods for generating cash. The three agreed that cash could be generated by kiting checks between Norman's accounts at petitioner's Kirksville bank and Lyman's accounts at other local banks (Pet. App. A-2 to A-3).[1] Shortly thereafter, to create inflated balances in these accounts, worthless checks drawn on Lyman's account at a bank in Schuyler County were deposited in Norman's account. Simultaneously, checks drawn on Norman's account at the Kirksville bank were deposited in Lyman's Schuyler County bank account. When the president of the Schuyler County bank demanded payment on two of Norman's checks, petitioner directed that they be honored despite his knowledge that Norman's account contained insufficient funds (Pet. App. A-5). Petitioner continued to facilitate the scheme by honoring other kited checks drawn on Norman's account and by mailing checks drawn on other banks to the regional Federal Reserve System bank for negotiation (Pet. App. A-5 to A-8).

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[1] As the court below explained, check kiting involves the creation of inflated balances in checking accounts by the exchange of checks of similar amounts between two accounts. During the delay resulting from the clearing process, the parties have the use of the deposited but uncollected balance in both accounts. (Pet. App. A-4 n.2.)

ARGUMENT

The decision of the court of appeals is correct and, contrary to petitioner's assertions (Pet. 10, 17-18), does not conflict with any decision of this Court or any other court of appeals. Nor does the decision of the court of appeals conflict with the holding of any case in the highest court of any state. Accordingly, further review is both unnecessary and unwarranted.

1. The offenses charged in the indictment occurred in the Eastern District of Missouri; the jury was drawn from the eastern judicial district of the State of Missouri. Petitioner contends that the Sixth Amendment, which requires that a criminal defendant be tried by a "jury of the State and district wherein the crime shall have been committed," also requires that a defendant be tried by a jury drawn from the particular division of the "district" in which the crime was committed. There is nothing in the language of the Sixth Amendment, its history, or any of the federal court decisions construing the provision to support that contention. See, *e.g.*, *United States* v. *Mase*, 556 F. 2d 671, 675 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978); *Zicarelli* v. *Gray*, 543 F. 2d 466, 475-482 (3d Cir. 1976) (en banc); *United States* v. *Brown*, 535 F. 2d 424, 429-430 (8th Cir. 1976). "The [S]ixth [A]mendment prohibits courts only from obtaining petit jurors from beyond the boundaries ot two large units, the state and the federal judicial district." *Zicarelli* v. *Gray*, *supra*, 543 F. 2d at 481.[2]

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[2]Rule 18, Fed. R. Crim. P., provides no support for petitioner's argument. First, the rule speaks only of "the place of trial" and not the place from which the jurors are to be drawn. Second, at all times relevant to this case, the rule authorized the district court to fix the place of trial at any place within the district in which the offense was committed.

Jurors may be drawn from the entire district or from one division of that district. *E.g.*, *Ruthenberg* v. *United States*, 245 U.S. 480, 482 (1918); *United States* v. *Florence*, 456 F. 2d 46, 48-50 (4th Cir. 1972); *United States* v. *Gottfried*, 165 F. 2d 360, 364 (2d Cir.), cert. denied, 333 U.S. 860 (1948).[3] In accordance with federal jury selection procedures, the United States District Court for the Eastern District of Missouri selected jurors from the Eastern Division, where the trial was held. That a panel of jurors drawn from the Northern Division might have included a greater or lesser number of "rural" jurors is of no constitutional significance.

This Court's decisions in *Duren* v. *Missouri*, 439 U.S. 357 (1979), and *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), provide no support for petitioner's argument in this case. Both cases involved intentional and systematic exclusion of "distinct" classes of otherwise eligible persons from jury service.[4] There is no evidence in this case that the jury

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[3]The Jury Selection and Service Act of 1968, 28 U.S.C. 1861, provides that "all litigants in the Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district *or division wherein the court convenes*" (emphasis added). Indeed, Section 29 of the Judiciary Act of 1789, ch. 20, 1 Stat. 88, which was enacted contemporaneously with the Sixth Amendment, authorized jury selection practices that resulted in the exclusion of residents of portions of the federal judicial district. See *Ruthenberg* v. *United States*, *supra*, 245 U.S. at 482; *Zicarelli* v. *Gray*, *supra*, 543 F. 2d at 477-478, 481, citing *United States* v. *Stowell*, 27 F. Cas. 1350, 1354 (C.C.D. Mass. 1854) (No.16,409).

[4]In *Duren* v. *Missouri*, *supra*, 439 U.S. at 360, state law automatically exempted from jury service any woman requesting such an exemption; this Court concluded that the under representation of women in the jury pool was the result of the statutory exemption system. *Id.* at 367. Similarly, in *Taylor* v. *Louisiana*, *supra*, 419 U.S. at 523, state law excluded women from jury service absent a written declaration evidencing the desire to be subject to jury service.

selection procedure used by the district court involved any "intentional" or "systematic" exclusion of persons with rural backgrounds.[5] Furthermore, the relevant "community" for purposes of the Sixth Amendment fair cross-section requirement is the community from which the jury is drawn. See *Duren* v. *Missouri*, *supra*, 439 U.S. at 365; *Taylor* v. *Louisiana*, *supra*, 419 U.S. at 531. In this case, the relevant "community" is the area comprising the Eastern Division of the Eastern District of Missouri. Petitioner does not contend that there was any under representation of persons with rural backgrounds in the venire from which the jury was selected in relation to the number of such persons in the Eastern Division, or in relation to the number of such persons in the Eastern District of Missouri.[6]

The racial overtones of both *Alvarado* v. *State*, 486 P. 2d 891 (Alaska 1971) and *People* v. *Jones*, 510 P. 2d 705, 108 Cal. Rptr. 345 (1973), virtually eliminate any support the language in those cases might otherwise provide for petitioner's argument here. Relying heavily on the sociological, anthropological, and psychological evidence in *Alvarado* that demonstrated the profound cultural differences between Native Alaskan villagers and

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[5]Indeed, as the court below noted (Pet. App. A-13), several persons with rural backgrounds were, in fact, included on a list of prospective jurors, but petitioner struck them from the jury.

[6]*Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), and *Strauder* v. *West Virginia*, 100 U.S. 303 (1879), also involved intentional and systematic exclusion of distinct classes of individuals from jury service. In addition, however, neither is based upon the Sixth Amendment. In *Thiel*, the Court relied on its power to supervise the administration of justice in the federal courts to hold that the systematic exclusion of "day laborers" from jury service was impermissible in a civil case. In *Strauder*, the Court held that a black defendant's right to the equal protection of the laws was infringed by a state law that excluded all blacks from jury service.

urban residents, the court held that a jury selection system that excluded all but 35 Native Alaskans from the pool of potential jurors was impermissible where the defendant was a Native Alaskan and the crime was committed in an "Alaska Native village." Similarly, in *People* v. *Jones*, the court held that a jury selected from a state judicial "district" in which the black population was only 7% was impermissible where the crime had been committed in a neighborhood that was 73% black and located in another state judicial "district" in which the population was 31% black.

2. Petitioner's contention (Pet. 13-19) that the government improperly introduced evidence of uncharged misconduct is insubstantial.

At trial the government introduced evidence showing that petitioner was an active and essential participant in the check kiting activities of several of his close friends and business associates. Petitioner's defense was essentially that he was unaware of the check kiting activities and therefore lacked the requisite intent (Pet. 2; Tr. 967-968). The Lyman-Gushleff check kite, referred to in the court of appeals' opinion as the "Kirksville-Green City Kite," was simply one in a series of cash generating schemes. Petitioner's role in mediating the dispute between Gushleff and Lyman as to the net result of their check-kiting activities was admissible under Rule 404(b), Fed. R. Evid., to show that his lack of knowledge defense was incredible. Although petitioner was not charged with any criminal conduct arising out of the "Kirksville-Green City Kite," the court of appeals properly found that the district court had not abused its discretion in admitting evidence of petitioner's participation in this affair.

Petitioner contends that under Rule 404(b) "the evidence must pertain to crimes committed *by the*

defendant on trial" (Pet. 15). The evidence of the check-kiting activities of Lyman and Gushleff was a necessary predicate to the evidence relating to petitioner's role as the mediator of the dispute that arose out of that scheme. Rule 404(b) permits the introduction of evidence "of other crimes * * * *or acts*" to prove "intent, * * * plan, knowledge, * * * or absence of mistake or accident." Evidence of a criminal defendant's "acts" may often demonstrate criminal activity on the part of his colleagues. See, *e.g.*, *United States* v. *McDonald*, 576 F. 2d 1350, 1356-1357 (9th Cir.), cert. denied, 439 U.S. 927 (1978); *United States* v. *Cady*, 567 F. 2d 771, 774-775 & n.3 (8th Cir.), cert. denied, 435 U.S. 944 (1978). Nevertheless, the evidence is admissible under Rule 404(b), unless its probative value on the issues of intent or knowledge is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," Rule 403, Fed. R. Evid. See, *e.g.*, *United States* v. *McDonald, supra*, 576 F. 2d at 1356; *United States* v. *Cady, supra*, 567 F. 2d at 775 n.3. The district court's resolution of this issue was plainly within its discretion, as the court of appeals found.[7]

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[7]According to petitioner "[o]ver 40 exhibits and 60 pages of testimony pertained solely" to the Kirksville-Green City Kite (Pet. 13). Even if true, petitioner's assertion provides no basis for finding an abuse of discretion. The "exhibits" referred to are individual checks and constitute less than 4% of the total number of exhibits introduced at this trial.

United States v. *O'Connor*, 580 F. 2d 38 (2d Cir. 1978), relied on by the petitioner (Pet. 17-18), is not to the contrary; the court excluded the evidence of uncharged criminal activity because it was irrelevant to any disputed issue in the case. Here, in contrast, the major issue was petitioner's knowledge and intent.

United States v. *Beechum*, 582 F. 2d 898 (5th Cir. 1978) (en banc), does not support petitioner's assertions here. Indeed, that case further establishes the correctness of the court of appeals' decision in this case. In *Beechum*, the Fifth Circuit held that evidence of the defendant's possession of two credit cards issued to others and stolen from the mail was admissible in a trial in which the defendant was charged with unlawful possession of a coin that had been stolen from the mail. The only defense asserted was lack of unlawful intent. Beechum testified that he had not intended to keep the coin and planned to turn it over to the proper authorities. The government introduced evidence suggesting that the defendant had possessed the stolen credit cards for about 10 months, which the court found was relevant to his intent to return the coin and, therefore, admissible under Rule 404(b) since its probative value was not substantially outweighed by the likelihood of unfair prejudice. Similarly, in this case the government introduced evidence that substantially lessened the credibility of petitioner's claim that he had no knowledge of his friends' check-kiting activities.

Petitioner apparently relies on the language in the long passage from *Beechum* reproduced in his petition (Pet. 16) relating to the need to establish that the defendant "committed the offense" to support the proposition that the evidence of the Kirksville-Green City Kite was inadmissible because it related to "crimes by other persons" (see Pet. 17). The term "offense," as used in *Beechum* includes " 'other crimes, wrongs, or acts,' as set forth in Fed. R. Evid. 404(b)." 582 F. 2d at 903 n.1. Therefore, in context, the passage relied upon requires that the government prove only that the crime, wrong, or act "was in fact committed and the defendant committed" it. The government clearly established that Young was informed of the kiting activities of Lyman and Gushleff

and that he mediated the dispute that arose out of those activities.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]Petitioner's reliance upon *United States* v. *Mann*, 590 F. 2d 361 (1st Cir. 1978), and *United States* v. *Vosper*, 493 F. 2d 433 (5th Cir. 1974), is also misplaced. In *Mann*, the court held inadmissible evidence that, a year prior to a charged drug smuggling offense, the defendant was present when an acquaintance was arrested for transporting cocaine. The court reasoned that, because different persons, methods of operations, and smuggling routes were involved, there was no logical nexus between this incident and the charged offense. 590 F. 2d at 369. Here, by contrast, the uncharged kiting incident, like the charged offense, involved petitioner's confederates, the same method of operation involving use of his bank, and the same time frame. In *Vosper*, the court held inadmissible evidence that the defendant on trial for bank robbery was observed near the scene of a prior robbery committed by a co-defendant, because there was no showing that the defendant was connected with the prior robbery in any way. 493 F. 2d at 437. But here the evidence showed not only that petitioner was aware of the scheme, but that he participated in it by mediating a dispute among his confederates.

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